
IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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SUPREME COURT
STATE OF WASHINGTON
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In re **JOHN SCANNELL**, Bar No. 31035, *Petitioner*

ON APPEAL FROM WASHINGTON STATE BAR ASSOCIATION

THIRD REVISED OPENING BRIEF

FILED
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STATE OF WASHINGTON
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5. THE APPEARANCE OF AN APPARENT EX PARTE CONTACTS BETWEEN DISCIPLINARY COUNSEL, THE HEARING EXAMINER IN ANOTHER CASE, AND INDIVIDUAL MEMBERS OF THE DISCIPLINARY COMMITTEE HAS TAINTED THIS CASE TO THE POINT THAT DISMISSAL OF ALL CHARGES IS WARRANTED.

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6. THIS CASE SHOULD BE DISMISSED ON THE BASIS OF PROSECUTORIAL MISCONDUCT.

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INTRODUCTION

The Washington State Bar Association has recommended that the undersigned attorney, John Scannell, be disbarred. The Association purports to claim that the attorney, by filing for protective orders for unconstitutional subpoenas and for complaining about the board's refusal to properly handle these motions, has committed misconduct requiring disbarment. As the argument submitted herein demonstrates, the board is taking this unprecedented action to cover for their own misconduct, and that of the disciplinary counsel in this case, Scott Busby.

The lawyer cited above demands that this proceeding be dismissed as well as all charges associated with it. He charges that multiple counts of appearance of fairness violations, ex parte contacts between hearing officer, a previous hearing officer, the disciplinary review committee that returned the charges, the disciplinary review committee, the chairman of the disciplinary committee, and the disciplinary committee as a whole have rendered further proceedings useless and void. He further contends that the hearing officer lacked jurisdiction to hear these charges, as the underlying action is an attempt to enforce a subpoena, which the Supreme Court has declared through the ELC and the Civil Rules cannot be enforced because there is a pending motion to terminate that has not been

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ruled upon. He has been denied due process at every turn, because of an unprecedented power grab by disciplinary counsel in which he claims to have the power of a one man grand jury, a concept unheard of in the history of the United States. Through misuse of what Disciplinary Counsel calls "precharging subpoenas" he hopes to set a dangerous precedent which could lead to a police state in the United States of America. The Hearing officer and Disciplinary Board supported this harassment, knowing full well that it was taken in retaliation for the lawyer's previous grievances against the bar and representation of Paul King, by imposing sanctions and making findings that are without precedent before the Disciplinary Board and the Washington State Supreme Court.

ASSIGNMENTS OF ERROR

ERRORS IN THE FINDINGS OF FACT

Finding 1.1.1 is in error. The hearing officer misstated the original charge. The original charge is ambiguous as to what the lawyer was charged. The original charge did not state whether the lawyer was charged with failing to obtain a written consent or providing a full disclosure or both. In this regard it was deficient in that it did not provide the lawyer with reasonable notice as to what was being charged.

Findings 1.1.4 and 1.15 are not supported by the record. The record indicates that the interests of Paul Matthew's, Stacey Matthew's, and the undersigned were all aligned at all stages of the litigation. There is no evidence that shows that any of these interests "might" have been compromised by joint representation.

There is no support for Finding 1.1.6. Since an oral disclosure was made, there is no evidence that any potential harm came to either the justice system nor the Matthews'

Finding 1.2.3 is in error. ELC 5.3(c) allows the undersigned to make a request for deferral and the record shows a legitimate reason how an investigation could compromise the rights of the parties.

Findings 1.2.5 and 1.2.6 are in error. The record (Ex 416) shows that the deposition was terminated due to Mr. Busby's insistence on continuing the questioning in the Rahrig matter, not because of the Matthews' matter.

Finding 1.3.3 is in error in that the undersigned attorney had a legitimate concern in terminating the deposition due to protecting attorney client information.

The finding of 1.3.4 is in error in that the reasons for demanding witness fees was not frivolous.

The finding of 1.3.5 is in error. (later)

The finding of 1.3.6 is in error in that nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.7 is in error in that nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.9 is in error in that nothing in the record indicates that the disciplinary board ever ruled on the motion.

Finding 1.3.10 is in error in that it is meaningless with respect to the computer search.

Finding 1.4 is in error.

ERRORS IN LAW

- 1. THE DISCIPLINARY BOARD SHOULD HAVE DISQUALIFIED THEMSELVES FROM CONDUCTING THESE HEARINGS DUE TO MISCONDUCT OCCURRING BEFORE THEIR REVIEW**
- 2. THE DISCIPLINARY BOARD ERRED IN NOT RULING THAT THE SUBPOENAS THAT TRIGGERED THIS INVESTIGATION VIOLATED BOTH THE FEDERAL AND STATE CONSTITUTION**
- 3. THE INVESTIGATION THAT LED TO THE CHARGES VIOLATED CR 30 AND ELC 5.5 BECAUSE THE TARGETS OF THE SUPOENAES WERE NOT NOTIFIED**
- 4. THE ATTORNEY WAS DENIED DISCOVERY ON HIS AFFIRMATIVE DEFENSES.**
- 5. THE ATTORNEY WAS PREJUDICED BY UNFAIR AND UNREASONABLE DISCOVERY DEMANDS.**
- 6. THE WASHINGTON STATE DISCIPLINARY BOARD IMPOSED UNPRECEDENTED EXTREME SANCTIONS IN THIS CASE.**
- 7. THE BOARD ERRED IN CONCLUDING THAT A WRITTEN CONFLICT AGREEMENT HAD TO BE MADE OVER A POTENTIAL CONFLICT OF INTEREST.**
- 8. THE BOARD ERRED IN CONCLUDING THAT THE DEFERRAL REQUESTS WERE "FRIVOLOUS", ESPECIALLY IN LIGHT OF THE BOARDS HISTORY IN GRANTING DEFERRAL REQUESTS.**
- 9. THE BOARD ERRED IN CONCLUDING THAT THE MOTION TO TERMINATE AN UNCONSTITUTIONAL DEPOSITION WAS FRIVOLOUS.**
- 10. THE BOARD ERRED IN CLAIMING THAT THERE WAS A WILLFUL DISOBEDIENCE OF AN ORDER BY THE LAWYER.**

11. THE LAWYER WAS DENIED DUE PROCESS WHEN THE INVESTIGATIVE AND THE ADJUDICATIVE PROCESS BECAME INTERTWINED.

12. THE APPEARANCE OF APPARENT EX PARTE CONTACTS BETWEEN THE DISCIPLINARY BOARD AND DISCIPLINARY COUNSEL REQUIRE DISMISSAL OF ALL CHARGES.

ISSUES PERTAINING TO ASSIGNMENT OF ERROR

1. Were the Findings of Fact Supported by Substantial Evidence?
2. Were some of the Findings of Fact actually Errors in Law?
3. Did the Disciplinary Counsel and Disciplinary Board engage in misconduct or give the appearance of unfairness when they hired joint counsel, brought a motion to dismiss the case, or have the appearance of ex parte contacts forbidden by the rules?
4. Are all potential targets of an ELC 5.5 precharging deposition entitled to notice of the deposition?
5. Was the attorney denied discovery on his affirmative defenses?
6. Was the attorney burdened with unfair discovery demands ordered by the hearing examiner?
7. Did the Board err in recommending the extreme sanction of disbarment when historically that has been reserved for much more serious offense?

8. Was the Board motivated by retaliation for its extreme recommendation due to the fact that they had committed misconduct earlier in the case?
9. Was it necessary in this case for an attorney to give a written conflict of interest statement on a potential conflict of interest?
10. Was the failure to give a written conflict statement in this case misconduct justifying a sanction by the court?
11. Was a deferral request by the lawyer “frivolous” in view of the board’s historical granting of deferrals for issues that were less serious than the lawyers?
12. Was the request to terminate an apparently unconstitutional deposition “frivolous”?
13. Does the Chairman of the Disciplinary Board have the power to rule on motion to terminate a deposition conducted under ELC 5.5?
14. Is the Board required to pay witness fees before requiring someone to appear at a deposition?
15. Did the intertwining of prosecutorial and judicial functions in this case including the appearance of ex parte contacts between the disciplinary counsel and the Disciplinary Board require a dismissal of all charges?

STATEMENT OF THE CASE

The lawyer stands accused, according to counts 2 and 4 of this action of filing frivolous motions, failing to attend depositions and failing to provide information as required the Rules of Professional Conduct. At the heart of the issue is whether ELC 5.5 allows Disciplinary counsel to conduct depositions without giving notice to anyone but the witness. The Supreme Court has already ruled in State v. Miles, 156 P.3d 864, 160 Wash.2d 236 (Wash. 04/26/2007) that such a subpoena lacks the force of law, yet for some unexplained reason, the disciplinary counsel, the hearing examiner, and the disciplinary board ignore this ruling and contend that the lawyer should be suspended and/or disbarred for attempting to quash a subpoena that lacks the force of law.

Before October 18, 2005, the lawyer was served with two subpoenas duces tecum requiring him to appear for a deposition pursuant to ELC 5.5 (Ex A-413, A-414). One subpoena was issued pursuant to WSBA file No. 05-00312, which concerns the lawyer's client Paul Matthews¹. The other was issued pursuant to WSBA file No. 00873, which concerns one Kurt Rahrig².

¹ Ex A-413, P. 2,3

² Ex A-413, P. 4,5

The second subpoena sought all documents relating to Kurt Rahrig and/or **Kurt Rahrig v. Alcatel USA Marketing Inc. et al**, including e-mails (Ex A-414 p. 4-5).

The deposition commenced on November 1, 2005, but was suspended when the lawyer made a demand pursuant to CR 30(d) that the deposition be suspended to permit him to file a motion to terminate or limit the scope of the examination. (Ex A-416. 5:13-23, 6:1-3). The motion was made after the following exchange:

Q. And you understand that failure of a lawyer to cooperate fully and promptly with an investigation may constitute grounds for discipline under the Rules for Enforcement of Lawyer Conduct?

A. Yes.

Q. And finally, you understand that you may not assert the attorney/client privilege or other prohibitions on revealing your client's confidences or secrets as a ground for refusing to provide information during the course of an investigation under Rule 5.4 of the Rules for Enforcement of Lawyer Conduct?

A. Subject to 5.4(b), which states that nothing in these rules waives or requires waiver of any lawyer's own privilege or other protection as client against the disclosure of confidences or secrets.

Q. That's correct. And you are looking at 5.4(b) and you are referring to the provision regarding your own confidences or secrets, but that is you as client rather than you as attorney?

A. That's not the way I interpret it.

Q. Tell me how you interpret it.

A. At this point in time I'm going to move under ELC 5.5 which refers to Civil Rule 30, Civil Rule 30(d). I'm going to bring a motion to terminate this examination with respect to both subpoenas that were issued to me; one in the Rahrig case, that's 05-00873 and also under 05-00312 which involves Paul Matthews.

Q. And you --

A. I'm going to make a demand under Civil Rule 30(d) that the taking of the deposition shall be suspended for the time necessary to make a motion for an order, and I'm going to be making a motion for under -- for both subpoenas. Hopefully it will be finished by the end of the day. Ex A-416, p. 5, l. 13 through p. 6, l. 25)

Ignoring lawyer's demand to terminate the deposition, Mr Busby attempted to continue:

Q. Okay, Well, I intend to continue with the deposition today, Mr. Scannell, and you can chose how you wish to proceed, but I think the subpoenas are validly issued and I intend to proceed.

As to the second subpoena, it appears that another attorney, Paul King, is the target of the investigation regarding Kurt Rahrig (CP 100-105). The lawyer has represented Mr. King before the Washington State Bar Association and in a subsequent appeal to the Washington State Supreme Court (currently being litigated). (In re: King No. 7370).

Mr. Rahrig appears to be claiming that Mr. King engaged in the unauthorized practice of law by participating in a case in Federal Court in Virginia while suspended from the state bar in Washington (CP 100-105).

It is unclear whether or not Mr. Rahrig is alleging that the lawyer engaged in any misconduct. The lawyer maintains in his response (Ex A-411) that he was never consulted regarding the Rahrig matter. He additionally maintains that he is not a partner of Mr. King, and did not associate on the case with Mr. King. All parties agree that the lawyer and Mr. Rahrig only met briefly on one or two occasions, that the lawyer never performed any legal services for Mr. Rahrig, and that the lawyer never agreed to represent Mr. Rahrig. (CP 105 Ex A-411, Dec 1 RP 82, l.10-13, RP 84. L. 13-25, RP 116, l.8, to 117, l. 8.)

A motion to limit the scope of the deposition concerning Mr. Rahrig was made earlier, when the lawyer complained among other things, that the WSBA lacked jurisdiction to investigate a grievance concerning alleged representation of a client in Virginia, and that the deposition was designed to elicit privileged attorney client information that had not been waived by Mr. King. (Ex 417). The Chairman of the Disciplinary Board, purporting to have some kind of authority to rule on the motion, denied the motion without giving reasons for his decision. (Ex A-421)

Acting upon the “order” issued by the previous Chair of the Disciplinary Counsel, Disciplinary Counsel issued another subpoena to Scannell, this time not giving notice to Mr. King.

After Mr. Busby rescheduled the deposition, Scannell requested proof of service that King was notified of the deposition (Ex 433, p. 4, l. 9). Disciplinary Counsel apparently takes the position that he is not bound by CR 30 with respect to notifying parties to the taking of a deposition.(Ex 433, p. 4, l. 16, 17), nor by the Washington State Supreme Court’s unanimous ruling State v. Miles.

Another motion for protective order was filed. (Ex 434) This time Gail McMonagle issued an “order” on behalf of the Bar. (Ex 439) Scannell complained through a motion for reconsideration that she did not have authority but his motion was denied with another “order.” (Ex A-441, A-446).

So far the lawyer has been unsuccessful in obtaining copies of the minutes of the Bar Association Disciplinary Committee minutes to shed any light on how Ms. Mcmonagle asserts her authority. (Dec. 3 RP. P. 136, l. 7-11).

On June 11, 2007, James M. Danielson issued an order appointing Mary Wechsler as a Hearing officer. (CP 46) This was served on John

Scannell by mail on June 11, 2007 by mailing it to him.(CP 47) On June 15th John Scannell filed a Motion to Disqualify the Hearing officer, the Chief Hearing Officer, the Chairman of the Disciplinary Committee, and the Disciplinary Committee as a whole for cause. (CP 48-64). On June 21, he filed a motion to disqualify the Hearing officer without cause by mailing it to the James M. Danielson and serving it on the WSBA offices and the Offices of Mary H. Weschler. (CP 74-75)

Disciplinary Counsel filed a response claiming that the request to disqualify for cause was rendered moot by filing the request to remove without cause. It was served on lawyer Scannell by mail on June 25, 2007. (CP 116-117)

Without waiting for a response from the Lawyer explaining why the request did not render the previous motion moot, the Chief Hearing Officer, on the very same day, June 25, 2007, removed the hearing officer, and appointed himself as hearing officer. (CP 118-121) This was served on the lawyer when it was dropped in the mail on June 25, 2007. (CP 118-121) On July 6, 2007, the lawyer appealed the decision of the hearing officer appointing himself as well as brought a motion to disqualify the hearing officer, the Chair of the Disciplinary Board, and the entire Disciplinary Board for Cause. (CP 122-143). He also brought a motion to

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request the removal of the hearing officer without cause.(CP 144-145).

On July 10, the Chief Hearing Officer denied the motion to remove the Hearing officer for Cause. (CP 146-148)

On July 24th, 2007, the lawyer appealed the Chief Hearing Officers order not disqualifying the hearing officer for cause. (CP 162-164). This Order was denied on September 26th, 2007 by the Chairman of the Disciplinary Committee along with all other motions and appeals including the motion to disqualify the hearing officer without cause (CP 170-171)). By this time, any decisions by members of the Disciplinary Board were improper because they had been having ex parte with the disciplinary counsel. In a related Superior Court action filed in conjunction with this case, the entire Disciplinary Committee hired joint counsel with a hearing officer that has heard the same issues that were heard in this case.(CP 676-712) Since the ELC provides that the decision to disqualify a hearing officer rests with the Chief Hearing Officer, the Chief Hearing Officer later removed himself as hearing officer. (CP 172).

Timothy Parker of Carney Badley Spellman was then appointed as hearing officer by the Chief Hearing Officer, who had already removed himself from the case. (CP 173-174). On July 16th, Mr. Parker called a

telephone hearing on short notice for the purpose of discussing a trial date.

(CP 184-187)

Disciplinary counsel, filed a motion to set the hearing date.(CP 175-176) Respondent responded to the motion. (CP 179-182).) On July 30th the ordered the matter to hearing (CP 184-187)

On September 16th, 2008, the Lawyer brought a motion to disqualify the hearing officer, the Chair of the Disciplinary Committee and the Disciplinary Committee as a whole for cause.(CP 199-216) He also brought a Motion for Discovery pursuant to ELC 10.11 that sought not only documents related to the issues raised by Disciplinary Counsel, but various issues raised in his answer (CP 217). In his Answer to the Charges filed on 6-22-07, the lawyer alleged various affirmative defenses, such as retaliation for his filing of a grievance concerning Christine Gregoire in 2000 as well as his representation of Paul King which followed. (CP 70-73) In the Gregoire grievance, the lawyer claimed that Christine Gregoire had not provided sufficient oversight to Janet Capps when Capps failed to file a notice of appeal which cost taxpayers \$17 million. (CP 70) The answer alleged that at the time the Gregoire grievance was filed, Loretta Lamb, the supervisor of Capps and direct subordinate Gregoire, was chairman of the disciplinary board.(CP 70-71).

The lawyer alleged that Loretta Lamb was able to use her position on the board to get the board to retaliate against King and the lawyer.(CP 71) In his discovery he requested all documents from the Gregoire grievance file as well documents from Paul King's file and his own file concerning the discipline that occurred over the past few years.(CP 217) He also sought emails not covered by attorney client privilege from Disciplinary counsel concerning Paul King and John Scannell for this period of time. (CP 217)). Finally, he sought access to minutes from the Disciplinary Board concerning this period of time. After a response was filed, the hearing officer issued an order on October 8, 2008 which granted discovery on documents that were covered by the charges made by disciplinary counsel, but denied documents concerning his request for information on Gregoire, Paul King's other grievances, the e-mails, and minutes from the disciplinary board. (CP 227-258, 266-268)

On November 3, 2008, disciplinary counsel brought a motion requesting Scott Busby be allowed to continue as advocate for the Disciplinary Counsel's office. (CP 272-275). On November 10, 2008, Disciplinary Counsel made a demand under ELC 10.13(c) for all documents in the possession of the plaintiff concerning Rahrig, as well as all email's concerning him. (CP 279). On November 17th, 2008, the

lawyer brought a motion to compel and a motion for continuance concerning the Associations failure to provide him with discovery.(CP 322-325). The lawyer brought a motion for continuance in order to respond to the demand for e-mails on November 20th, 2008. (CP 329-332)

A hearing was held on December 1, 2, 3, 4 and a transcript has been made of the hearing. On December 2, the hearing officer issued an order allowing the discovery under ELC 10.11.(CP 452-454). After briefing, the hearing officer issued Findings of Fact and Conclusions of Law on February 3, 2009. (CP 456-526)

Neither party appealed the decision of the hearing examiner as the Disciplinary Board reviews a recommendation of suspension automatically. After briefing, (CP 540-624) the undersigned lawyer filed a motion to disqualify the disciplinary counsel and entire board based upon misconduct (CP 625-653). In their initial finding the board ignored the motion to disqualify and simply upheld the hearing examiner's recitation of the facts concluding the lawyer should be disbarred instead of suspended for two years.(CP 716-717)). The Board eventually ruled against the motion to disqualify (CP 152) after a motion for reconsideration was filed.(CP 639-712)

**OPPOSITION TO THE DISCIPLINARY BOARD'S ADOPTED
STATEMENT OF FACTS AND CONCLUSIONS OF LAW THAT
WERE FOUND BY THE HEARING EXAMINER:**

ERRORS IN FINDINGS OF FACT

1.1.1 The hearing officer misstated the original charge. The original charge is ambiguous as to what the lawyer was charged with. The original charge did not state whether the lawyer was charged with failing to obtain a written consent or providing a full disclosure or both. In this regard it was deficient in that it did not provide the lawyer with reasonable notice as to what was being charged.

Findings 1.1.4 and 1.15 are not supported by the record. The record indicates that the interests of Paul Matthews, Stacy Matthews, and the undersigned were all aligned at all stages of the litigation. There is no evidence that shows that any of these interests "might" have been compromised by joint representation. Disciplinary Counsel points to In re Disciplinary Proceeding of Marshall, 160 Wn.2d 317, 157 {3d 859 (2007) for the idea that only a potential conflict, need arise for the disclosure to be made in writing. That decision was not decided until 2007 which was long after the conduct in question and was not a unanimous decision. The Marshall decision has never been clarified to distinguish how probable a potential conflict must be before it rises to the

level of a violation of the RPC. RPC 1.7(a)(2) states there must be a “significant risk” that the representation will be materially limited. There was no evidence of “significant risk” in this litigation.

Marshall is distinguishable from the case at bar. There, the court decided that the claims of the parties were different even though they shared the broad goal of stopping discrimination. Here, there is no evidence that the individual goals of the Matthews deviated at all during the litigation, other than the speculation testimony of a later counsel³. In addition, in **Marshall**, there was a finding that there was no disclosure by the counsel. Here there is abundant uncontroverted evidence that disclosure was made, and that disclosure was approved after the fact by a superior court judge.⁴

There is no support for 1.1.6. Since an oral disclosure was made, there is no evidence that any potential harm came to either the justice system nor the Matthews.

The undersigned objects to finding 1.2.3. ELC 5.3(c) allows the undersigned to make a request for deferral and the record (specifically p.

³ Undersigned properly objected to speculations of the defense attorney at p. 156, l. 23 to p. 157; l. 5; p. 158, l. 20, to p. 159, l. 3 and re-raises them here.

⁴ Dec. 2, P. 89, l. 12-18, P.95, l.7-10, P. 97, l. 4-17; Dec. 3, P. 146, l.15, P.148, l. 2; Dec. 4, p. 48, l.13-17

82-85, December 3, 2008) shows a legitimate reason how an investigation could compromise the rights of the parties.

There is no support in the record for the conclusion of 1.2.5 and for 1.2.6. The record (Ex 416) shows that the deposition was terminated due to Mr. Busby's insistence on continuing the questioning in the Rahrig matter, not because of the Matthews matter. Therefore, at the time the Matthews motion was filed, the deposition had already been delayed. There is nothing in the record that suggested that the motion delayed it further for any significant period of time. The record shows that once a ruling was made, however illegitimate it was, the deposition was allowed to take place.

The finding of 1.3.3 is objected to. The record (Page 6 of Ex 416) clearly demonstrates that Mr. Busby was asserting that the undersigned had no right to assert attorney client privilege on behalf of Mr. King. A reasonable conclusion of this was that Mr. Busby was conducting the deposition for that very purpose. Since Mr. Scannell represented Mr. King on issues before the bar, he had a legitimate reason for seeking a motion to terminate. Furthermore, the undersigned denies that that motion was ruled upon as there is no authority for the proposition that the

chairman of the disciplinary board can unilaterally act on behalf of the board as a whole when charges have not been filed.

The finding of 1.3.4 is objected to as the reasons for demanding witness fees was not frivolous. Disciplinary counsel claims that witness fees required in "civil cases" in RCW 2.40.020 are not applicable because ELC 10.14(a) states that hearing officer should be guided in their evidentiary and procedural rules by the principle that disciplinary proceedings are neither civil nor criminal but are suit generis hearings. But the subpoena issued under ELC 5.5 is not being issued for a disciplinary proceeding under ELC 10. No hearing officer has been appointed and no charges were filed. ELC 5.5 refers to CR 30 as the procedure for following in conducting a deposition. ELC 30(a) in turn states that a subpoena should be served as in CR 45. Significantly, CR 45(d) refers to RCW 5.56.010 as a basis as to how subpoenas are issued for trial. RCW 5.56.10 states as follows:

Any person may be compelled to attend as a witness before any court of record, judge, commissioner, or referee, in any civil action or proceeding in this state. No such person shall be compelled to attend as a witness in any civil action or proceeding unless the fees be paid or tendered him which are allowed by law for one day's attendance as a witness and for traveling to and returning from the place where he is required to attend, together with any allowance for meals and lodging theretofore fixed as specified herein:

PROVIDED, That such fees be demanded by any witness

residing within the same county where such court of record, judge, commissioner, or referee is located, or within twenty miles of the place where such court is located, at the time of service of the subpoena: PROVIDED FURTHER, That a party desiring the attendance of a witness residing outside of the county in which such action or proceeding is pending, or more than twenty miles of the place where such court is located, shall apply ex parte to such court, or to the judge, commissioner, referee or clerk thereof, who, if such application be granted and a subpoena issued, shall fix without notice an allowance for meals and lodging, if any to be allowed, together with necessary travel expenses, and the amounts so fixed shall be endorsed upon the subpoena and tendered to such witness at the time of the service of the subpoena: PROVIDED FURTHER, That the court shall fix and allow at or after trial such additional amounts for meals, lodging and travel as it may deem reasonable for the attendance of such witness

Ironically, the revisor's note to RCW 2.40 cites Title 5 as the basis for compensating witnesses in depositions. So it appears that the Supreme Court, when it crafted ELC 5.5, may have intended the deposition to be a "civil proceeding" as opposed to a sui generis hearing when it referred to CR 30 as to how the deposition should be conducted. Significantly ELC 5.5(b) states that subpoenas must be served as in "civil cases", which in turn is the exact language of RCW 2.40.020.

If the intent of the Disciplinary committee was to waive the \$12 filing fee so as to avoid a delay, then why not pay the \$12 immediately or after a short delay as was done before? The only delay in the proceeding was caused by Disciplinary counsel's delay in paying the \$12. By paying

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the \$12 he has waived any grounds for the present complaint. The court in Hawkinson v. Conniff, 53 Wn.2d 454, 334 P.2d 540 (1959) described the voluntary payment rule as “a universally recognized rule that money voluntarily paid under a claim of right to the payment and with knowledge by the payor of the facts upon which the claim is based cannot be recovered on the ground that the claim was illegal or there was no liability to pay in the first instance.”

Finally, in Washington, it has long been held that a disbarment proceeding is a civil and not a criminal one. In re Jett, 108 P.2d 635, 6 Wash.2d 724. In re Little, 40 Wash.2d 421, 244 P.2d 255. As the law only distinguishes between civil and criminal with respect to the payment of witness fees, the former is the one applicable.

The issue of witness fees in a bar proceeding has not been ruled upon yet by our Supreme Court. The lawyer should not be penalized for raising an issue of first impression that has probable or even possible merit.

The finding of 1.3.5 is objected to for reasons argued later in this brief.

The finding of 1.3.6 is objected to as nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.7 is objected to as nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.9 is objected to as nothing in the record indicates that the disciplinary board ever ruled on the motion.

The finding of 1.3.10 is objected to on the grounds that it is meaningless with respect to the computer search. The record clearly shows that the lawyer made a good faith effort to search his computer and that none of the emails significantly contributed to the record. Given the state of today's technology, it is doubtful that any lawyer could say for certainty that he could produce every email on a certain case, especially an attorney who has over 250,000 emails in his mailbox.

This finding ignores the time distance between ELC 5(b) request and the ELC 10.13(c) demand. The ELC 5(b) request was made in October of 2005. The ELC 10.13 demand was made in November of 2008 over 3 years later. If Disciplinary counsel had limited the 10.13 demand to that requested in 2005, it would have been much easier to respond to. As it is, the hearing examiner is retroactively sanctioning lawyer for not recognizing that a demand made four years ago would become more onerous in the future.

Finally, there is no support for 1.4. Respondent's conduct of refusing to cooperate with an unconstitutional subpoena that lacked force of law, did not delay the investigation at all. It was the unwillingness of disciplinary counsel to notify the targets of the subpoena, as well as the abject refusal of the disciplinary board to rule on his motions that led to the delay.

ERRORS IN CONCLUSIONS OF LAW

The undersigned objects to Conclusions of Law 2.1, 2.2, and 2.3 for the aforementioned reasons. The undersigned objects to Conclusion 2.4 on the grounds that he was denied discovery which would have shown that he is being treated far differently than other attorneys charged with similar conduct. He was also denied discovery that would have shown more clearly the link between the actions of disciplinary counsel and the grievance against Gregoire.

ERRORS IN AGGRAVATING FACTORS

Undersigned disagrees with 2.8.2. Under the facts of this case, he was refusing to cooperate with an unconstitutional subpoena in order to protect his client Mr. King. That motive is neither dishonest, nor selfish.

Undersigned disagrees with 2.8.5. Paul Matthews and Stacy Matthews are not victims.

Undersigned disagrees with 2.8.6 with respect to the Matthews grievance. He was only an attorney for two years at the time he was retained, with very little experience in criminal defense.

ERRORS IN MITIGATING FACTORS

2.10. Under ABA 9.32 (b) there is an absence of a selfish or dishonest motive.

2.11. Under ABA 9.32(d) there was a good faith and timely effort to have written disclosures made, once he was notified of the problem by a Superior Court Judge.

OBJECTIONS TO CERTAIN FINDINGS ALLEGED IN DISCIPLINARY COUNSEL'S STATEMENT OF FACTS.

The attorney objects to all proposed findings that were not found by the hearing examiner and the Disciplinary Board as they are based upon credibility findings that were never made by the court below. These include the following.

Page two second paragraph, where the Disciplinary counsel concluded

“At the same time, Mr. Matthews worked in Respondent's office on the understanding that the work he did there would offset legal fees. The terms of this transaction, including the rate at which Mr. Matthews would offset his legal fees, were never reduced to writing.”

This proposed finding is irrelevant as it relates to a violation that was never charged.

Page 4, line 3 until page 5, line 1 should be stricken. This involves another theory that was never charged nor found.

Page 5, line 8-10, is a finding not made and disputed.

Page 6, lines 14-17, as these findings were not made, disputed, and incorrect as to the record.

Page 6, lines 18 to page 7, line 3. These are proposed findings that were not made, lifted out of context, and not used as a basis for the finding by the Board.

Page 7, lines 7-15 as these are proposed findings that were not made, disputed, and not used as a basis for the finding by the board.

Page 8, line 1-3 as this proposed findings was not made, irrelevant, and not used as a basis for the finding by the board.

Page 8, lines 9-10 as this proposed finding was not made, based on remarks lifted out of context and not used as a basis for the finding by the board.

Page 8, line 17, to p. 9, line 7 as these findings are irrelevant, based upon remarks lifted out of context and not used as a basis for the finding by the board.

Page 9, lines 9 to page 13, line 12, as these findings are relevant only to the conspiracy charge that was dismissed by the hearing examiner, and likewise was never adopted by the Disciplinary Board.

Page 14, lines 1-3 as this proposed finding was not made and is not relevant to the charges sustained by the Board.

Page 14, lines 14-18 as this is a misstatement of the finding of fact that was actually made.

Page 20, lines 2 through 18 as these were not listed as a basis for the Board's action and are in dispute as to relevance.

ARGUMENT

1. THE LAWYER HAS BEEN DENIED DUE PROCESS AND HIS RIGHT TO A FAIR AND IMPARTIAL TRIBUNAL BECAUSE OF MISCONDUCT OCCURRING BEFORE THE TRIAL.

The lawyer contends that instant proceedings have become a sham. He has filed a number of actions that should have been heard by the disciplinary board, and his motions were short-circuited by the chairman of the disciplinary board, who herself has engaged in misconduct by having ex parte contacts with the Disciplinary Counsel.

At the heart of the dispute is the contention of Disciplinary Counsel to demand oppressive depositions and make oppressive discovery requests, without any showing of good cause whatsoever. On the flip side,

Disciplinary Counsel has been able to convince the hearing examiner and the Disciplinary Board, that the lawyer is entitled to absolutely no meaningful discovery that would demonstrate he is subjected to disparate treatment in retaliation for bringing charges against the governor, and by implication, the chairman of the disciplinary committee, who misused her position to engage in misconduct on behalf of herself and the governor.

The lawyer was subjected to unprecedented discovery demands before the hearing took place that are unheard of in the American judicial system. First, Disciplinary Counsel was allowed to take depositions without notifying anyone. Then just days before trial, Disciplinary Counsel made the unprecedented demand that the lawyer search individually through over 250,000 emails that occurred over a four year period to produce every single one that could possibly be related to this action. When the lawyer made a good faith effort to produce the emails in question (none of which were relevant to anything), but explained the obvious, that he could not guarantee that every one had been produced, the hearing examiner made an unprecedented ruling that somehow the lawyer should have been able to assure that every email was produced, because a subpoena had been issued over 4 years ago that somehow put him on notice that this demand would be made in the future. This

ludicrous ruling demonstrates that the hearing examiner himself is part and parcel of the same harassment and retaliation that the lawyer has been subjected to.

Meanwhile, the lawyer has been denied the most basic of discovery that he should have been entitled to as a member of the bar association. He has been denied access to the minutes of the disciplinary board and denied access to related public files in this case, under the ludicrous theory that such a request was "oppressive." Incredibly, the hearing officer and Disciplinary Board upheld these objections.

The lawyer has also attempted to have three hearing officers, the Chief Disciplinary Officer, the Chairman of the Disciplinary Board and the Disciplinary Board as a whole, removed for cause because they were witnesses. The lawyer's attempt to have the Chief Hearing examiner removed from the proceedings was to have been ruled upon by the chairman of the Disciplinary Board under ELC 10.2(b)(3). But the chairman of the disciplinary board was also expected to be called as a witness and should not have been allowed to rule on the motion for the Chief Hearing Examiner at the time the motion was filed in June of 1997.

In addition, in the summer of 1997, after the motion was filed, she had apparent ex parte contacts with disciplinary counsel by hiring joint

counsel with disciplinary counsel, and then declared in her answer, apparently filed in conjunction with disciplinary counsel, that all the lawyer's motions were "without basis in law or fact". When she ruled on the issue in September on 2007, there was no explanation on the record giving reasons for her apparent ex parte contacts with disciplinary counsel. Under these circumstances, there was not even a minimum of appearance of fairness and her decisions including a decision on a hearing examiner over which she had no jurisdiction, should be considered void. Similarly, the same holds true for the rest of the disciplinary committee. Nowhere, have these individuals explained either ex parte contacts nor the appearance of ex parte contacts with the disciplinary counsel on a case that is pending before them.

Without a valid ruling on the Chief Hearing Examiner's status, his decision to appoint Parker in the Spring of 2008 should likewise be considered void. In addition, there is the additional issue of whether the Chief Hearing Examiner, after determining that he was unqualified to serve as hearing officer, should be allowed to continue on in the proceedings as Chief hearing officer.

2. NEITHER DISCIPLINARY COUNSEL, THE HEARING OFFICER, NOR THE DISCIPLINARY BOARD HAVE JUSTIFIED THE EXTREME SANCTIONS IN THIS CASE.

In a recent case, the Washington State Supreme Court ruled that
disbarment is usually only appropriate in certain cases:

Disbarment is the most severe sanction. We have historically reserved disbarment for grievous acts of ethical misconduct. Disbarment has generally been applied to four categories of misconduct: (1) the commission of a felony of moral turpitude, In re Disciplinary Proceeding Against Day, 162 Wn.2d 527, 173 P.3d 915 (2007) (first degree child molestation); In re Disciplinary Proceeding Against Stroh, 97 Wn.2d 289, 644 P.2d 1161 (1982) (tampering with a witness); In re Disbarment of Barnett, 35 Wn.2d 191, 211 P.2d 714 (1949) (bartering narcotics);*fn28 (2) forgery, fraud, giving false testimony and knowing misrepresentations to a tribunal, In re Burtch, 162 Wn.2d at 896; In re Disciplinary Proceeding Against Whitney, 155 Wn.2d 451, 120 P.3d 550 (2005); In re Guarnero, 152 Wn.2d 51; In re Disciplinary Proceeding Against Whitt, 149 Wn.2d 707, 72 P.3d 173 (2003); In re Disciplinary Proceeding Against Miller, 149 Wn.2d 262, 66 P.3d 1069 (2003);*fn29 (3) misappropriation of client funds, In re Schwimmer, 153 Wn.2d 752; In re Disciplinary Proceeding Against VanDerbeek, 153 Wn.2d 64, 101 P.3d 88 (2004);*fn30 and, (4) extreme lack of diligence, In re Disciplinary Proceeding Against Anschell, 149 Wn.2d 484, 69 P.3d 844 (2003).*fn31 It would be unusual, perhaps unprecedented, to disbar a lawyer who does not have a disciplinary history for misconduct involving a single client in a single proceeding for conduct that lasted approximately two months unless it fell within one of these categories. In re Disciplinary Proceeding Against Eugster, No. 200, 209 P.3d 435, 166 Wash.2d 293 (Wash. 06/11/2009)

It should be clear from the arguments raised in this brief, that none of the above categories of misconduct even remotely apply in this case. It should be equally clear, that since the Bar has so far departed from the findings of Eugster, that their motive in bringing the ultimate sanction should be presumed to be retaliation and harassment for objecting to their own unethical conduct.

COUNT 1

In count 1, Disciplinary Counsel, the hearing officer and the Disciplinary Board charge that the lawyer violated RPC 1.7(b) because (1) he did not disclose material facts including an explanation of the implications of the risks involved in common representation and (2) and obtain his clients consent in writing.

Disciplinary Counsel's sole evidence that the first element was violated was the testimony of Paul Matthews. In his questioning, Mr. Busby simply asked if Mr. Matthews remembered the elements that Disciplinary Counsel thought should be disclosed. What he conveniently overlooked is that it is undisputed that both Mr. And Mrs. Matthews were questioned by Judge Comstock in detail as to what the judge thought was

appropriate disclosure. After this questioning, the judge was satisfied that that appropriate disclosures had been made.

What both the hearing officer and disciplinary fail to recognize is the quality of the evidence against the lawyer. Mr. Matthews readily conceded under cross examination that he could not remember what disclosures were or were not made because of the length of time that had transpired. This is hardly enough to establish by a clear preponderance of evidence that Mr. Matthews has controverted the testimony of the lawyer that full disclosure was made and this disclosure was in fact approved by a Superior Court judge after extensive questioning.

Although the undersigned attorney concedes that, as a matter of caution, he should have made these disclosures in writing⁵, the fact that he did not, does not automatically translate into a bar violation for which he should be disciplined. RPC 1.7 (b) requires disclosure in writing if there is a “concurrent conflict of interest”. See RPC 1.7(a). A concurrent conflict of interest is defined as either (1) the representation of one client will be directly adverse to another client or (2) there is a “significant risk”

⁵ The lawyer admitted that subsequent to this incident he makes such disclosures about “potential” conflicts of interest to clients in writing..

that that the representation of one or more clients will be materially limited by the lawyer's responsibilities to another client, a former client or a third person or by the personal interest of the lawyer.

Disciplinary counsel appears to argue that, as a matter of law, there is always a concurrent conflict of interest between two criminal defendants. However, the Model Rules he refers to, only speak of a "potential conflict of interest" not a "concurrent conflict of interest". The "potential conflict of interest" is not the law in Washington, only a "concurrent conflict of interest". In Washington, there has to be either representation "will be directly adverse", or a "significant risk" that the representation "will be materially limited". Disciplinary counsel has presented no evidence that either of these last two conditions took place.

This court heard detailed testimony from both the prosecutor and the undersigned lawyer as to how the negotiations transpired. Neither testified that there was any attempt to get Mr. Matthews a lighter sentence at the expense of Mrs. Matthews. The uncontroverted testimony of the lawyer was that Mrs. Matthew pleaded guilty because of the quality of evidence against her, not because there was an effort to get a lighter sentence for Mr. Matthews. The testimony of the two defendants as to what had transpired was the same. There was no evidence that the goals

of the defendants were not the same. There was no evidence that Mr. and Mrs. Matthews had confidential information that they needed kept from each other. There was no evidence that one client attempted to shift blame to the other. There was no evidence that either Mr. or Mrs. Matthews had a different theory of the case. There was no evidence that there were inconsistent defenses presented. There was no testimony that there were discrepancies between the testimony of the two. There was no evidence that the attorneys advice either consciously or unconsciously was colored by his interest in the contingency award. In fact, the only part of the agreement that affected the contingency award was the Alfred plea, which the prosecutor credibly testified she had no interest in withholding. In fact, the Alfred plea was there for the asking.

Therefore there was no evidence that the lawyer's financial interest in the litigation affected in any way the outcome of this case or even if there was a significant risk that it would. In fact, there is no evidence at all that a conflict of interest ever arose on civil litigation, because the interests of Paul Matthew, Stacey Matthews, and John Scannell were the same. No one got any money unless the case was won.

The Rules of Professional Conduct speak to "significant risk" not just a "potential." The fact that the rules in Washington are different from

the Model rules is significant. Presumably, if the Washington Supreme Court would have wanted the issue to be only “potential”, they would have chosen that language. Not only is there no “clear preponderance of evidence” that a significant risk existed at the time of this concurrent litigation, there is no evidence at all of any risk occurred at any time.

The undersigned attorney testified that he has, as both an attorney and as a non-attorney participated in numerous legal actions where potential risks were not outlined in writing, some involving very prestigious law firms. This suggests that if this is to be the standard, then the rules should be drafted differently. The cases cited by the disciplinary authority are not helpful in this regard. In both **In re Disciplinary Proceeding against Haverson**, 140 Wn.2d 475, 486, 998 P.2d 833 (2000) and **In re Disciplinary Proceeding against Egger**, 152 Wn.2d 393, 411, 98 P.3d 477 (2004), the conflicts of interests cited were either actual conflicts of interest, or conflicts where there was an actual significant risk that was much greater than the potential cited in the case at bar.

Likewise, a search of all published cases involving RPC 1.7(b) have been looked at by the undersigned attorney.⁶ All cases either

⁶ See **In re Disciplinary Proceeding Against Holcomb**, No. 200, 173 P.3d 898, 162 Wash.2d 563 (Wash. 12/20/2007) **In re Disciplinary Proceeding Against McKean**, 148 Wash.2d 849, 64 P.3d 1226 (Wash. 2003).
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involved actual conflicts of interest or a “significant risk” of a conflict of interest that “materially limited the representation.”

The Washington State Supreme Court presumes any licensed and practicing attorney maintains the high morals of the profession. In re Discipline of Little, 40 Wn.2d 421, 430, 244 P.2d 255 (1952). This presumption is only rebutted when facts are proved beyond a clear preponderance of the evidence. In re Disciplinary Proceedings Against Allotta, 109 Wn.2d 787, 792, 748 P.2d 628 (1988). The high court has a constitutional obligation to ensure no attorney is unduly deprived of his property or liberty interests in his professional license. Bang Nguyen v. Dep't of Health, 144 Wn.2d 516, 522 n.4, 29 P.2d 689 (2001) (“[A] professional license represents a property interest to which due process protections apply.”). Challenged findings of facts must be supported by substantial evidence, which incorporate this heightened burden of proof.

03/06/2003). In re Disciplinary Proceeding Against Marshall, No. 200, 157 P.3d 859, 160 Wash.2d 317 In re Disciplinary Proceeding Against Dennis O. McMullen, 127 Wash. 2d 150, 896 P.2d 1281 (Wa. 06/29/1995) In re Disciplinary Proceeding Against Ivan D. Johnson, 118 Wash. 2d 693, 826 P.2d 186 (Wa. 03/19/1992)

In re Disciplinary Proceedings Against Poole, 156 Wn.2d 196, 209, 125 P.3d 954 (2006). Nevertheless these findings cannot be conclusory, but must set forth specific facts demonstrating a clear violation of the Rules of Professional Conduct. Id.

Disciplinary counsel does not propose a finding that shows how the interests of Stacey Matthews, Paul Matthews, or John Scannell conflicted in any way or how there was a “significant risk” that “materially limited the representation.” The Washington State Supreme Court has found conflicts when an attorney represents a party with opposite interests to a client, a third party, or himself. See **In re Disciplinary Proceeding Against McKean**, *supra*; **Eriks v. Denver**, 118 Wn.2d 451, 460, 824 P.2d 1207 (1992). But here the interests of Paul Matthews, Stacey Matthews, and John Scannell were aligned. There is absolutely no evidence that Paul Matthews, or Stacey Matthews had any different ideas on how the case should proceed or that there was any risk that the representation was compromised. In fact, the evidence demonstrates that the decision by the defendants to hire the Defendant was a good decision which paid off because they were able to obtain advice that would not have been obtained through a public defender. They hired Mr. Scannell to protect their interests in another lawsuit, and he was able

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to do so through the use of the Alfred plea. For this he should be praised, not condemned.

Count 2

Of the multiplicity of arguments advanced by Disciplinary Counsel as to why the lawyer impeded the Matthews investigation, the hearing examiner and Disciplinary Board found only two. In doing so, the hearing officer rejected Disciplinary Counsel's arguments that he impeded the investigation by not giving answers the disciplinary counsel wanted. This is further evidence of improper motive. As to the hearing examiner and Disciplinary Board findings, the lawyer responds as follows.

1. The alleged frivolous deferral request.

Disciplinary Counsel and the hearing officer claim that the deferral request was "frivolous." However, the undersigned attorney credibly testified that the two cases in question were closely related to each other as well as Scannell's representation because King was attempting to use a default judgment in the first case to attach the proceeds from the second case. He also testified that there was a race between the two to obtain the money and that it was decided by a matter of minutes. His reason for delaying the investigation was simply to prevent the bar association from interfering from this litigation by inadvertently disclosing

information that would either hinder or aid one of the parties, or worse, causing a potential conflict of interest becoming an actual conflict of interest, which would have required the attorney to withdraw from representing both clients. Since Mr. Scannell represented Mr. King on numerous other cases and because he represented Mr. Matthews significant wage claim, to problems created by withdrawing from those cases would have been monumental for all parties.

Also, this court should take judicial notice of the treatment of the undersigned attorney as compared to Gregoire. There was far less reason to grant Gregoire a deferral on two of the three charges than in this case. Yet Gregoire was able to get an indefinite deferral which prevented any meaningful investigation until this day. According to a sworn declaration submitted by the undersigned attorney, there aren't even any files left as they have been destroyed. So in one case, a powerful political figure was able to request a deferral and avoid any investigation at all. In the instant case, a deferral request that was clearly more substantive has become a reason for disbarment. If the undersigned counsel is immediately suspended for actions the governor likewise committed to avoid investigation at all, would be detrimental to the integrity and standing of

the bar and the administration of justice, as well as contrary to the public interest.

2. The alleged frivolous motion to terminate.

The lawyer replied to a subpoena, which Disciplinary Counsel claims is legal under ELC 5.5, by filing a motion to terminate the deposition under ELC 5.5 and CR 30(d).

The Hearing Officer makes a finding that the objections were “frivolous” without stating which of Disciplinary arguments were sustained. Therefore the lawyer will respond to all arguments raised by Disciplinary Counsel.

First, disciplinary counsel faults the undersigned by not objecting to the subpoena before the day of the deposition. However, as explained by the undersigned at trial, there are no provisions in the ELC to file a protective order for an ELC 5.5 deposition under CR 26(c). As disciplinary himself will argue, the Civil rules do not come into play until charges have been brought under ELC 10.1(a). Since this is a precharging deposition the only way to contest a deposition brought under ELC 5.5 is to file a motion to terminate the deposition on the day of the deposition pursuant to CR 30(d). So Disciplinary counsel appears to contend by simply bringing a motion under CR 30(d), the only method available, one

is guilty of violating the Rules of Professional Conduct. This argument is absurd on its face.

Then, Disciplinary appears to argue that by disagreeing with the disciplinary counsel's view of what is oppressive, one is guilty of misconduct by converting that disagreement into a motion to terminate the deposition. In other words, it is up to the disciplinary counsel to determine what is oppressive, and if he determines the it is not, then the undersigned is guilty of a bar violation for challenging disciplinary counsels viewpoint. If this type of finding is used to suspend the undersigned, this would give immense power to Disciplinary Counsel to crush a legitimate defense to a bar complaint. This would be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the public interest.

The subpoena was oppressive on its face. It made the ludicrous demand that the undersigned produce documents that Disciplinary Counsel knew did not exist.

Next, the subpoena was designed to harass the plaintiff over issues that are ludicrous on their face. Neither the disciplinary review committee nor the hearing officer made any kind of finding that Disciplinary Counsel's theory that someone occasionally working on a computer

translates into a bar violation. There is no case law in Washington which supports the contention that a transaction such as this, (informally having a client work on computers) is a “business transaction.” Past cases involving business transactions do not involve transactions even remotely similar to the one at issue here.⁷

Without support in case law, one is left to search for possibly analogous rulings. The RPC governing gifts does not forbid attorneys from accepting gifts from clients. RPC 1.8(c). **In re Disciplinary Proceeding Against Paul G. Gillingham**, 126 Wash. 2d 454, 896 P.2d 656 (Wa. 06/08/1995).

Finally, since the facts in the Matthew case was largely undisputed, neither the hearing officer nor the Disciplinary Counsel, nor the Disciplinary Board have explained why a deposition was even necessary. Disciplinary Counsel claims that the fact that the deposition

⁷. Attorney obtaining interest in a \$192,000 Certificate of Deposit is a business transaction. **In re Disciplinary Proceeding Against Miller**, 149 Wash.2d 262, 66 P.3d 1069 (Wash. 04/24/2003). Attorney obtaining two loans totaling \$40,000 is a business transaction. **In re Disciplinary Proceeding Against Dennis O. McMullen**, 127 Wash. 2d 150, 896 P.2d 1281 (Wa. 06/29/1995) \$25,000 loan is a business transaction. **In re Disciplinary Proceeding Against Paul G. Gillingham**, 126 Wash. 2d 454, 896 P.2d 656 (Wa. 06/08/1995). \$20,000 loan is a business transaction. **In re Disciplinary Proceeding Against Ivan D. Johnson**, 118 Wash. 2d 693, 826 P.2d 186 (Wa. 03/19/1992). Attorney Withdrawing \$11,128.25 from a trust account to form a company with a client is a business transaction. **In re Disciplinary Proceeding Against McKean**, 148 Wash.2d 849, 64 P.3d 1226 (Wash. 03/06/2003).

only lasted 65 minutes proves that it was not oppressive. What he leaves out is what valuable information did he glean from this supposed necessary deposition? The answer was nothing. The facts in this case were not in dispute. It does not take 65 minutes to determine the non-existence of two documents you have been told do not exist. It does not take a deposition to determine that someone who volunteers to work on a computer is not a "business transaction" of the type contemplated by the RPC's as least with respect to how it has been interpreted in the past. If there was some kind of valuable information that was obtained during this meaningless deposition, then what was it? Significantly, Mr. Busby did not enter the deposition into evidence. That speaks volumes on how necessary it was.

Count 4

As before, Disciplinary Counsel charged misconduct that was apparently not used by the Hearing Examiner as a basis for sustaining the charge. Failure to file a prompt response will not be addressed as it was not sustained by the hearing officer.

1. Failure to Comply with a discovery request

In this allegation, the disciplinary counsel failed to comply with a discovery request by announcing he was bringing a motion to terminate

the deposition. As argued earlier, this is the only valid method for challenging the deposition.

It is the contention of the lawyer that ELC 5.5 is not a blanket authorization for disciplinary counsel to engage in a fishing expedition. It is also not authorization for Disciplinary Counsel to obtain attorney client privileged information from an attorney who is representing another attorney before the bar association. By failing to disclose what violation was being investigated, and by claiming the counsel could not claim attorney client privilege, Disciplinary Counsel gave full indication that this was simply another attempt to harass the lawyer, as he had also done on the Matthews grievance.

2. The alleged frivolous motion.

Disciplinary Counsel and the hearing officer fault the lawyer because he could cite no authority for challenging the scope of an ELC 5.5 deposition. The undersigned argues that it is impossible to cite authority for such a proposition because there has been no litigation defining what the valid scope of an ELC 5.5 deposition⁸.

Disciplinary Counsel apparently argues that there is no limit. There does not have to be any charges defined, so presumably the scope of

⁸ ELC 5.5 has only been in existence since October 1, 2002.

the deposition is unlimited. It is up to the deponent to guess what the deposition might be about, and therefore, it is permissible for disciplinary counsel to engage in a fishing expedition to question the deponent as to whatever disciplinary counsel may be curious about. However, he has cited no authority that such a deposition is allowed under our judicial system.

In addition, the nature of the questioning indicated that Mr. Busby had every intention of forcing the deponent to reveal attorney client information in his representation of Mr. King. The hearing officer made a finding that there was an "assumption" by the lawyer that questioning would involve another attorney who had not been notified. It is hard to conceive how the questioning would not involve King, when the very nature of the charge is that the lawyer aided King in the practice of law.

All of these issues are important ones and involve issues of first impression that have yet to be decided by the Washington State Supreme Court. To immediately suspend an attorney who has attempt to challenge this power grab would be detrimental to the integrity and standing of the bar and the administration of justice, as well as contrary to the public interest.

4, 5, 6,7,8 The alleged willful disobedience of an order, failure to
comply with discovery, and frivolous objection

Disciplinary counsel then argues that the Respondent's first motion was denied citing Ex 421. But Ex 421 was signed by the chairman of the disciplinary board without consulting the rest of the board.

Disciplinary counsel has cited no authority as to why the chair of the disciplinary board has authority to rule on this motion.

Based upon his conversations with King, Scannell requested proof of service that King was notified of the deposition. Ex 433, p. 4
Disciplinary Counsel apparently takes the position that he is not bound by CR 30 with respect to notifying parties to the taking of a deposition.

Acting upon the "order" issued by the previous Chair of the Disciplinary Counsel, Disciplinary Counsel issued another subpoena to Scannell, this time not giving notice to Mr. King. Another motion for protective order was filed. This time Gail McMonagle issued an "order" on behalf of the Bar. Scannell complained through a motion for reconsideration that she did not have authority but his motion was denied with another "order." Scannell and King have since filed suit challenging the legality of the orders issued by the Chairs of the Disciplinary Committee as well as the constitutionality of conducting depositions

without giving notice to the targets of the investigation. This suit was recently dismissed by the Washington State Supreme Court without a finding on the merits. The Court of Appeals and Supreme Court ruled that Superior Court did not have jurisdiction to hear the dispute. Supreme Court No. 83205-6, Court of Appeals No. 60623-9-I

Disciplinary Counsel's actions of taking depositions without providing notice to anyone violate both the federal and state constitution as well as the civil rules. First, since Disciplinary Counsel provides no notice of the deposition, there is no way for anyone that has standing to protest the scope of the deposition. CR 30(h)(2)(3)(4) give the parties the right to object and instruct the witness not to answer if the taking of the deposition becomes oppressive. Here, Mr. Busby, avoids this requirement by not letting the parties attend, thus giving him the power to oppress and harass with impunity and without due process.

Disciplinary counsel attempts to evade these due process requirements by claiming that somehow King and Scannell are not "parties." By doing so, he ignores the phrase "to the extent possible, CR 30 or 31 applies to depositions under this rule." Furthermore, if Disciplinary Counsel were correct, there would be nothing to prevent him from issuing subpoenas for whatever reason he wanted, even if it meant

denying rights guaranteed under the federal or state constitution. It is well established that when a statute is subject to two interpretations, one constitutional and the other unconstitutional, the court will presume the legislature intended a meaning consistent with the constitutionality of its enactment. Treffry v. Taylor, 67 Wash. 2d 487, 408 P.2d 269 (1965); Martin v. Aleinikoff, 63 Wash. 2d 842, 389 P.2d 422 (1964). The same principle should hold true for the civil rules.

Secondly, by not notifying the parties of the deposition, Disciplinary Counsel denies them the right to cross examine the witnesses. It is axiomatic that the right to call and examine witnesses is fundamental to the due process required by the Fourteenth Amendment and by Article I Section 3 of the Washington Constitution. Flory v. Dept. of Motor Vehicles, (1974) 84 Wash. 2d. 568, 571, 527 P. 2d. 1318 citing Goldberg v. Kelly, (1970) 397 U. S. 254, 25 L. Ed. 2d. 287, 90 S. Ct. 1011, the minimum requirements of a due process hearing include the right to confront adverse witnesses, to present evidence, and to representation by counsel. Goldberg at 397 U.S. 268 found:
... and an effective opportunity to defend by confronting any adverse witnesses and by presenting his own arguments and evidence orally.

As it is similar to the language of the Sixth Amendment, “confronting adverse witnesses” clearly means to cross exam such witnesses in the presence of the trier of fact. Please see Crawford v. Washington, (2004) 541 U.S. 36, 158 L. Ed. 2d. 177, 124 S. Ct. 1354. “[P]resenting his own . . . evidence orally” clearly means to call witnesses and to direct and cross examine them in the presence of the trier of fact.

Absence of such opportunity to cross examine adverse witnesses and to present own witnesses is fatal to the Constitutional adequacy of such procedures, Goldberg, at 397 U.S. 268. Goldberg involved an administrative termination of welfare benefits.

Here, Disciplinary Counsel is insisting on the right to subpoena and examine witnesses through power of subpoena, without giving the respondent lawyers a similar right. By denying them the right to cross examine, the deposition is one sided and biased.

Here, Disciplinary Counsel went to a review committee with a one sided deposition of a potentially hostile witness, (Mr. Maurin), without even providing counsel with all the exhibits, or an opportunity to cross examine the witness. This has now subjected the undersigned to the time and expense of a lengthy trial, without ever having the opportunity to cross examine or even call the witness for a deposition.

The undersigned also contends that holding depositions without notice violates the State Constitution, even if these actions do not violate the Federal Constitution.

A party who seeks to establish that the state constitution provides greater protection than the United States Constitution must engage in the six-factor analysis set forth in State v. Gunwall, 106 Wn.2d 54, 720 P.2d 808 (1986). A party is relieved of performing a Gunwall analysis only when an analysis in a previous case has determined that a 'provision of the state constitution independently applies to a specific legal issue'. State v. Ladson, 138 Wn.2d 343, 348, 979 P.2d 833 .

In this case, the issue of privacy is similar to the issues of privacy raised in the original Gunwall decision:

The following Gunwall factors establish that the right to privacy under the state constitution is even stronger than under the Federal Constitution and are a factor in this case..

Under the first Gunwall factor, the court considers the textual language of the state constitution. The text of the state constitution may provide cogent grounds for a decision different from that which would be arrived at under the federal constitution. It may be more explicit or it may

have no precise federal counterpart at all. The textual language of the state constitution. Article 1, section 7 of our state constitution provides:

“No person shall be disturbed in his private affairs, or his home invaded, without authority of law.” This provision thus focuses on the protection of a citizen's private affairs. Accordingly, as this court has held, "due to the explicit language of Const. art. 1, § 7, under the Washington Constitution the relevant inquiry for determining when a search has occurred is whether the State unreasonably intruded into the defendant's 'private affairs.'" In this case, the Disciplinary Counsel has not just subpoenaed records as was done in Gunwall. He has subpoenaed the lawyer's trial counsel of a recent Supreme Court Case. He has also subpoenaed someone who might be expected to know of the sexual relationships that King might have had in the past. In fact, the record shows that Disciplinary Counsel, as part of the deposition of Mark Maurin, in fact, conducted a fairly lengthy interview with Mr. Maurin concerning the relationship that King may have had with Tina Lesh. This style of inquisition, without probable cause, is totally devoid of any kind of historical precedent in our State, which has jealously guarded the citizens rights to privacy far beyond which is protected by the Federal Constitution. Furthermore, our Supreme Court has taken a very protective

view of the attorney client relationship. For example in re Disciplinary Proceeding Against Schafer, 149 Wash.2d 148, 66 P.3d 1036 (Wash. 04/17/2003) the Washington Supreme court took a narrow reading of the crime fraud exception by finding Schaefer guilty of breaching attorney client confidentiality. In doing so, Washington indicated that it would not follow the trend of allowing more exceptions to the attorney client privilege as suggested by proposed modifications to the ABA standards.

The second Gunwall factor are the significant differences in the texts of parallel provisions of the federal and state constitutions. Such differences may also warrant reliance on the state constitution. Even where parallel provisions of the two constitutions do not have meaningful differences, other relevant provisions of the state constitution may require that the state constitution be interpreted differently.

The fourth amendment to the United States Constitution provides as follows:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Thus, the language of the federal constitution is substantially different from that of the parallel provision of our state constitution. This

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is particularly true in that unlike the federal constitution, our state constitution expressly provides protection for a citizen's "private affairs". In a number of cases, this court has held that this difference in language is material and allows the court to render a more expansive interpretation to article 1, section 7 of the federal constitution.

The third Gunwall factor analyzes the State constitutional and common law history. This may reflect an intention to confer greater protection from the state government than the federal constitution affords from the federal government. The history of the adoption of a particular state constitutional provision may reveal an intention that will support reading the provision independently of federal law.

It is unnecessary in this case to discuss our state common law history relative to Const. art. 1, § 7. It suffices to observe that in 1889, our State Constitutional Convention specifically rejected a proposal to adopt language identical to that of the Fourth Amendment, before adopting Const. art. 1, § 7 in its present form. This, too, lends support to reading article 1, section 7 independently of federal law in this case.

The fourth Gunwall factor examines preexisting state law. Previously established bodies of state law, including statutory law, may also bear on the granting of distinctive state constitutional rights. State law

may be responsive to concerns of its citizens long before they are addressed by analogous constitutional claims. Preexisting law can thus help to define the scope of a constitutional right later established.

The fifth Gunwall factor examines the differences in structure between the federal and state constitutions. The former is a grant of enumerated powers to the federal government, and the latter serves to limit the sovereign power which inheres directly in the people and indirectly in their elected representatives. Hence the explicit affirmation of fundamental rights in our state constitution may be seen as a guaranty of those rights rather than as a restriction on them.

As the Washington State Supreme Court has often observed, the United States Constitution is a grant of limited power authorizing the federal government to exercise only those constitutionally enumerated powers expressly delegated to it by the states, whereas our state constitution imposes limitations on the otherwise plenary power of the state to do anything not expressly forbidden by the state constitution or federal law. This also supports construing article 1, section 7 of the state constitution so as to guarantee protection of the defendant's privacy rights in the context presented here.

The sixth Gunwall factor examines matters of particular state interest or local concern. Is the subject matter local in character, or does there appear to be a need for national uniformity? The former may be more appropriately addressed by resorting to the state constitution.

Washington v. Gunwall, 106 Wash. 2d 54, 720 P.2d 808 (Wa. 06/12/1986). In Washington, the Supreme Court's has taken a protective view of the attorney client privilege as in the Schafer case.

All of these arguments were recently addressed in the case of In State v. Miles, 156 P.3d 864, 160 Wash.2d 236 (Wash. 04/26/2007). The Washington State Supreme Court ruled that an administrative subpoena, even in a highly regulated profession such as here, served without giving notice to the target of the subpoena, violated Article 1, Section 7 of the Washington State Constitution and therefore was not issued under authority of law. In that case, the court reversed a criminal conviction that was based in part on bank records that were obtained under an administrative subpoena where the defendant was not given notice.

3. THERE IS AN INHERENT CONFLICT OF INTEREST BETWEEN THE MEMBERS OF THE DISCIPLINARY COMMITTEE AND THE RESPONDENT LAWYER DUE TO THE EXISTENCE OF A PRE-EXISTING LAWSUIT.

Disciplinary Counsel may try and argue that the Disciplinary Committee may not have to recuse because an automatic recusal cannot be

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had by the simple act of suing the judge, citing, as he has in the past, United States v. Studley, 783 F.2d 934, 940-41 (9th cir. 1986); Ronwin v. State Bar of Arizona, 686 F.2d 692, 701 (9th Cir. 1981), Hoover v. Ronwin, 466 U.S. 58, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984); United States v. Grismore, 564 F.2d 929, 933 (10th Cir. 1977), cert. Denied 435 U.S. 954 (1979). United States v. Pryor, 960 F.2d 1,3 (1st Cir. 1977), cert. Denied, 435 U.S. 954 (1978). However, this case is distinguishable from each of those suits as the suit filed by the respondent lawyer was filed well before the conflicts of interests arose, and the suit itself is a good faith attempt to resolve an unprecedented issue.

In addition, there are other reasons that distinguish this case from the above. By hiring joint counsel with the prosecutor, and then prejudging the case on the basis of an investigation conducted by the prosecutor, the disciplinary has shown bias in this case.

4. WHEN THE PROSECUTION OF THE RESPONDENT ATTORNEY BECOMES INTERTWINED WITH THE INVESTIGATIVE AND ADJUDICATIVE FUNCTIONS OF THE COURT, A DUE PROCESS AND/OR AN APPEARANCE OF FAIRNESS VIOLATION HAS OCCURRED.

A leading case on this issue is Washington Medical Disciplinary Board v. Johnston, 29 Wash. App. 613, 630 P.2d 1354 (Wa.App. 06/23/1981), where it was held that if the prosecution became connected

with the investigative and adjudicative roles of an agency, a due process violation might result:

In contending that the Disciplinary Board violated due process, Johnston argued that the Board impermissibly acted as investigator, prosecutor, and judge against him. This combination of functions, according to Johnston, deprived him of a fair and impartial hearing. See generally 3 K. Davis, Administrative Law § 18 (2d ed. 1980).

In response the Disciplinary Board relied heavily, as did the Superior Court, on Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975), where the Supreme Court upheld a Wisconsin statute concerning discipline of doctors even though the agency played both an investigative and adjudicative function.

While conceding that combining the investigative and adjudicative function does not necessarily lead to a due process violation, the Washington high court in Johnston stated that a different result would occur if there was a commingling of the prosecutorial function citing Huber Pontiac, Inc. v. Allphin, 431 F. Supp. 1168 (S.D. Ill. 1977), vacated on other grounds sub nom. Huber Pontiac, Inc. v. Whitler, 585 F.2d 817 (7th Cir. 1978). More importantly, the court ruled that a violation of the appearance of fairness doctrine occurs.

We note initially that the appearance of fairness doctrine applies to proceedings such as those conducted by the Disciplinary Board. *Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n*, 87 Wash. 2d 802, 557 P.2d 307 (1976); *Stockwell v. State Chiropractic Disciplinary Bd.*, 28 Wash. App. 295, 622 P.2d 910 (1981). The purpose of this doctrine was clearly enunciated many years ago:

The principle of impartiality, disinterestedness, and fairness on the part of the judge is as old as the history of courts; in fact, the administration of justice through the mediation of courts is based upon this principle. It is a fundamental idea, running through and pervading the whole system of judicature, and it is the popular acknowledgement of the inviolability of this principle which gives credit, or even toleration, to decrees of judicial tribunals. Actions of courts which disregard this safeguard to litigants would more appropriately be termed the administration of injustice, and their proceedings would be as shocking to our private sense of justice as they would be injurious to the public interest. The learned and observant Lord Bacon well said that the virtue of a judge is seen in making inequality equal, that he may plant his judgment as upon even ground. Caesar demanded that his wife should not only be virtuous, but beyond suspicion; and the state should not be any less exacting with its judicial officers, in whose keeping are placed not only the financial interests, but the honor, the liberty and the lives of its citizens, and it should see to it that the scales in which the rights of the citizen are weighed should be nicely balanced, for, as was well said by Judge Bronson in **People v. Suffolk Common Pleas, 18 Wend. 550:**

"Next in importance to the duty of rendering a righteous judgment, is that of doing it in such a manner as will beget no suspicion of the fairness and integrity of the judge."

State ex rel. Barnard v. Board of Educ., 19 Wash. 8, 17, 52 P. 317 (1898). Thus, even a mere suspicion of irregularity or an appearance of bias or prejudice must be avoided. **Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n**, *supra* at 809.

Applying the doctrine to this case, we are compelled to hold that a disinterested person would be reasonably justified in thinking that partiality may have existed. See Swift v. Island County, 87 Wash. 2d 348, 552 P.2d 175 (1976). There is no real dispute that Board members were actively involved in investigating the charges against Johnston. At the first hearing regarding the suspension of Johnston's license, the chairman of the Board stated "that the Board is quite thoroughly conversant with all the factors that have led up to this hearing." Board members, as noted above, had reviewed investigative reports prepared by the staff of the Board and the letters of complaint from Drs. Mack and Sandstrom. The formal charges against Johnston were issued over the name of the secretary of the Board, who also sat as a Board member in the adjudication of the charges. One member went so far as to discuss the case privately with a key witness, Mack, prior to these proceedings. These same Board members ultimately determined whether Johnston's license should be revoked. Although this combination of the investigative and adjudicative functions, as discussed above, does not amount to violation of due process, nevertheless, it allows the Board to act as accuser and judge in the same proceedings. As the Supreme Court stated in State ex rel. Beam v. Fulwiler, 76 Wash. 2d 313, 315-16, 456 P.2d 322 (1969):

Despite the integrity of the respective members of the commission, and their undoubted desire to be objective in their appellate disposition of the matter, it is highly unlikely, under the unusual circumstances prevailing, that the respondent or anyone in a like situation could approach or leave a hearing presided over by a tribunal so composed with any feeling that fairness and impartiality inhered in the procedure. See also Loveland v. Leslie, 21 Wash. App. 84, 583 P.2d 664 (1978).

In addition to this combination of functions, an aspect of the Board's proceedings which, we do not deem dispositive, yet worthy of comment, raises the specter of unfairness. Throughout these proceedings the one assistant attorney general assigned to the Board acted in a dual

capacity as legal adviser to the Board and prosecutor. Although this dual capacity is specifically authorized by RCW 18.72.040, we believe performance of the two roles by the same individual is inherently inconsistent and thus creates the possibility of disproportionate influence with the Board.

The Board's response to this issue is that the appearance of fairness doctrine is not violated if due process is not violated. We do not believe, however, that the broad language contained in the cases supports this argument. See Vache, Appearance of Fairness: Doctrine or Delusion, 13 Willamette L.J. 479, 487 (1977). Further, traditional due process analysis focuses on the possibility of actual bias or prejudice. See, e.g., Withrow v. Larkin, 421 U.S. 35, 43 L. Ed. 2d 712, 95 S. Ct. 1456 (1975); Tumey v. Ohio, 273 U.S. 510, 71 L. Ed. 749, 47 S. Ct. 437, 50 A.L.R. 1243 (1927); FTC v. Cement Inst., 333 U.S. 683, 92 L. Ed. 1010, 68 S. Ct. 793 (1948). The appearance of fairness doctrine, however, clearly focuses on the possibility of the appearance of bias or prejudice. See Narrowsview Preservation Ass'n v. Tacoma, 84 Wash. 2d 416, 526 P.2d 897 (1974); Chicago, M., St. P. & P. R.R. v. State Human Rights Comm'n, supra.

In conclusion, we feel compelled by our holding to discuss future proceedings. By our decision we do not hold that all Disciplinary Board proceedings, as currently conducted, are invalid. We note that as presently enacted the statute governing the Disciplinary Board provides for the appointment of pro tem members for the purpose of participating in disciplinary proceedings. RCW 18.72.135. As we read the current statute, the problems inherent when the Board members who investigate charges are the same members who ultimately act as decision makers can be avoided by the convening of separate panels to investigate and adjudicate specific charges. Such a procedure is an alternative method of eliminating the inconsistent nature of the assistant attorney general's dual capacity, as he or she would be acting as adviser to one panel and prosecutor to a separate panel.

We also wish to emphasize that by our decision we are not questioning the ability of doctors to act in a quasijudicial capacity. Our review of the record, which consists almost entirely of highly technical medical testimony, confirms the wisdom of the legislature's decision to place responsibility for the discipline of doctors on members of the medical profession. Clearly, fellow physicians have the requisite expertise and experience to understand best the appropriate standards to which all doctors must adhere. Nor do we mean to impugn the integrity of the Board members involved in this case. As we noted above, see footnote 9, *supra*, our focus must be directed toward the appearance of impropriety; our remarks should not be construed as implying that actual impropriety occurred.

Here, as argued earlier, there is an appearance of *ex parte* contacts between the hearing examiner and the prosecutor Busby, who have had joint representation with him in a previous court hearing concerning the very issues that were before the Disciplinary Board in this case. This comingling of prosecutorial and adjudicative functions is even worse than in Johnston and should now be allowed to stand. Recusal and/or dismissal of charges would be the only remedy of a violation of this magnitude.

5. THE APPEARANCE OF AN APPARENT EX PARTE CONTACTS BETWEEN DISCIPLINARY COUNSEL, THE HEARING EXAMINER IN ANOTHER CASE, AND INDIVIDUAL MEMBERS OF THE DISCIPLINARY COMMITTEE HAS TAINTED THIS CASE TO THE POINT THAT DISMISSAL OF ALL CHARGES IS WARRANTED.

While the rules allow for an appeal of a hearing examiner's decision to a disciplinary review committee, the existing conflicts of pre-

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existing lawsuits coupled by apparent ex parte contacts between disciplinary counsel, members of the disciplinary committee, and a previous hearing examiner through joint representation through the same attorney have rendered such an appeal impossible.

The hearing examiner involved in the previous lawsuit did not even address the issue of an apparent ex parte contact that necessarily occurred when there was joint representation by the same counsel in the previous litigation. Neither have individual members of the review committee when they were assigned this case as well as another case that involves the attorney.

At a minimum, these decision-makers should have put on the record the nature of the representation and the existence of any chinese walls. By not doing so, there now is a clear presumption of ex parte contact that has not been addressed. Disciplinary counsel claims that any litigant could sabotage his own prosecution ignores the simple remedy of having the Bar appoint separate counsel for the hearing examiner and the Disciplinary Board which would have easily resolved the issue.

The Disciplinary Board are acting as appellate judges in a matter that will could eventually be reviewed by the Washington State Supreme Court. The respondent attorney contends that as appellate judges they are

subject to the Code of Judicial Conduct. The following opinions are relevant in determining the propriety of having the Disciplinary Board having joint counsel with the disciplinary counsel.

Ethics Advisory Committee

Opinion 93-14

Question

When an appellate judge has retained an attorney, should that judge recuse himself/herself when another member of that law firm appears in court even though on a totally unrelated matter? Does it matter if the law firm is a large one, located in a large metropolitan area? Would the same advice be given for cases presently under consideration but not yet decided?

Does it make a difference if the property in question is the separate property of the judge's spouse and there are other parties on the same side?

Answer

CJC Canon 3(C) provides that judicial officers should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.

When an appellate court judge has retained an attorney, the appellate court judge is required to disclose that relationship when a member of that law firm appears in court on a totally unrelated matter and should recuse if there is any objection. This is also true for cases which are presently under consideration but not yet decided.

The size and location of the law firm, the fact that the property in question is the separate property of the spouse and the number of parties on the same side does not make any difference.

In the Superior Court case, the Disciplinary Board, along with hearing examiner Schoggle had engaged Mr. Welden Bar counsel as their attorney. Mr. Busby practices with Mr. Welden in the same firm. This is an automatic disqualification.

In addition since Mr. Busby has the same attorney for virtually the same issues the chances of exparte contact and also is a direct violation of CJC3).

Opinion 89-13

Question

May a court commissioner hear any matters in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved? May a court commissioner hear any matters in which the attorney for the opposing counsel in the lawsuit against the commissioner is involved? May a court commissioner hear any matters in which the attorney is associated with either the commissioner's attorney or associated with opposing counsel?

Answer

CJC Canon 3(C) requires judges to disqualify themselves in a proceeding in which their impartiality might reasonably be questioned. Therefore, a court commissioner may not hear any matters which are not agreed (whether the same be actively contested or any posture of default) in which the attorney who represents the commissioner in a lawsuit in the commissioner's personal capacity is involved or the opposing counsel in the lawsuit is involved. This restriction shall apply while the lawsuit is pending or for a reasonable period of time after its termination. The type of lawsuit is not relevant to the issue of disqualification. The

court commissioner may hear matters in which the attorney is associated with either the commissioner's attorney or opposing counsel if 1) the commissioner discloses on the record the relationship to the commissioner's attorney or opposing counsel, 2) that attorney is not associated in any way with the commissioner's lawsuit and the commissioner's attorney or opposing counsel have not been involved in the matter before the commissioner, and 3) offers to recuse. The commissioner may enter all agreed

orders brought by the commissioner's attorney, opposing counsel, or any of their associates.

In this case, a Hearing Examiner, Disciplinary Counsel and the Disciplinary Board together have engaged Mr. Welden as their counsel.

Further the following Canons impose a duty on Judges to disqualify themselves:

Canons of Judicial Conduct

3(D) Disqualification.

(1) Judges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned, including but not limited to instances in which: .

- (a) the judge has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding.

In this case, the entire Disciplinary Board must disqualify themselves on the basis of this rule alone. By having their counsel file an answer declaring the grievances of the undersigned "frivolous", the Board has demonstrated an incredible personal bias or prejudice concerning the

party and have also apparently gained personal knowledge of disputed evidentiary facts concerning the proceeding.

This kind of appearance problem was recently addressed in In re Disciplinary Proceeding Against Sanders, No. 200, 145 P.3d 1208, 159 Wash.2d 517 (Wash. 10/26/2006)

“Where a judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence can be debilitating. The canons of judicial conduct should be viewed in broad fashion, and judges should err on the side of caution.*fn11 Under Canon 3(D)(1), “[j]udges should disqualify themselves in a proceeding in which their impartiality might reasonably be questioned.”*fn12 In *Sherman*,*fn13 the court found that where a trial judge “may have inadvertently obtained information critical to a central issue on remand, . . . a reasonable person might question his impartiality.” *fn14 The court set the test for determining impartiality:

[I]n deciding recusal matters, actual prejudice is not the standard. The [Commission] recognizes that where a trial judge's decisions are tainted by even a mere suspicion of partiality, the effect on the public's confidence in our judicial system can be debilitating The test for determining whether the judge's impartiality might reasonably be questioned is an objective test that assumes that “a reasonable person knows and understands all the facts.” *fn15

This court in *In re Disciplinary Proceeding Against Sanders* *fn16 noted that the interest of the State in maintaining and enforcing high standards of judicial conduct under the auspices of Canon 1 is a compelling one. *fn17 In *Sanders*, this court balanced that interest against Justice Sanders' First Amendment rights and found that an independent basis for finding a violation of Canon 1 under those

circumstances was not possible. Justice Sanders argues that the language in Canon 1 is hortatory and therefore cannot stand as an independent basis for a violation of the Code of Judicial Conduct. In the instant case, Canon 1 sets the conceptual framework under which Canon 2(A) operates. Canon 2(A) provides the more specific restraint, to wit: "Judges should . . . act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary." Under the circumstances of this case, Canon 1 taken in conjunction with Canon 2(A) provides a sufficiently specific basis to find a violation of the Code of Judicial Conduct. Here, it was clear that there was a substantial basis and expectation that Justice Sanders would be in contact with possible litigants who had pending litigation before the court and that this contact would be viewed as improper. *fn18 We concur with the Commission's finding that it was clearly reasonable to question the impartiality of the justice under the circumstances of this case. **In re Disciplinary Proceeding Against Sanders**, No. 200, 145 P.3d 1208, 159 Wash.2d 517 (Wash. 10/26/2006)

By having the same attorney represent both disciplinary counsel and the appellant Disciplinary Board, as well as a hearing examiner, the Board has presented an appearance that it is fashioning a joint defense with disciplinary counsel to the petition of the attorneys in the suit. It is virtually impossible for the attorney representing the hearing officer, disciplinary counsel, and the disciplinary board to fashion a joint defense without some type of communication occurring between them. This appearance cannot be cured disclosing the contents or nature of the

representation without breaking attorney-client privilege of other parties to the suit.

6. THIS CASE SHOULD BE DISMISSED ON THE BASIS OF PROSECUTORIAL MISCONDUCT.

In addition to the apparent ex parte communications leading to preconceived bias on the part of the Disciplinary Board, there are other reasons indicating that prosecutorial misconduct has occurred. In what appears to be effort to enhance the penalties and allow for the highest penalties possible he has this case because of what appears to be vindictiveness for his failure to properly set the deposition and also the procedural issues that are unresolved.

The 11th circuit has specifically said when whenever a prosecutor brings more serious charges following exercise of procedural rights, “vindictiveness” is presumed, provided that the circumstances present itself in actual or realistic fear of vindictiveness. **United States v. Spence**, 719 F. 2d. 358, 361 (11th Cir. 1983) further stating:

In the classic case prosecutorial vindictiveness case, the subsequent charges are merely “harsher variations of the original

Respondent in this present case is merely exercising his procedural rights under the rules promulgated by the Supreme Court of Washington.

The exercise of those rights should not be punished or used for leverage

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for further punishment whether by design or negligence of disciplinary
counsel who continues to advocate disbarment over the exercise of
procedural rights.

DATED at Seattle, Washington, this 15th day of April, 2010,

/S/
John Scannell, WSBA #31035

I hereby certify that on April 15, 2010, I caused to be served a copy of this
document by the method indicated below and addressed to the following:

Scott Busby
1325 Fourth Ave., Ste. 600
Seattle, WA, 98101-2539

<input type="checkbox"/>	Hand Delivered	By: <u>John Scannell</u>
<input checked="" type="checkbox"/>	U.S. Mail first class postage prepaid	
<input type="checkbox"/>	Overnight Mail fees prepaid	
<input checked="" type="checkbox"/>	Email	
<input type="checkbox"/>	Facsimile	time of completion : _____

/S/
John Scannell, WSBA #31035
Attorney For John R. Scannell